



FIVE ST ANDREW'S HILL

# TAINTED GIFTS

## GIFT OR BOOMERANG?

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# TAINTED GIFTS – GIFT OR BOOMERANG?

- The role of “Tainted Gifts” in the confiscation system
- What is a gift?
- It looks like a gift and smells like a gift – but is it a gift?
- Implications of a finding that D has made a tainted gift
- Implications of a finding that D has not made a tainted gift
- Incomplete gifts
- Implications for the donee
- Caselaw



# POCA s.77(1) to (5) – definition (of sorts)

## Criminal Lifestyle

- A gift is tainted if it was made by the defendant at any time after 6 year period proceeding commencement of proceedings
- Or if the gift is made by the defendant of property which is the proceeds of crime or represents proceeds of crime.

## No Criminal lifestyle.

A gift is tainted if it was made by the defendant at any time after earliest date of commission of offences.

# Transfers at undervalue – s78

- Transfers property to another person for a consideration whose value is significantly less than the value of the property = gift.
- The property given is to be treated as such share in the property transferred as is represented by the difference between the value of property and the value of the consideration
- Expressed as a percentage of the actual value of the property at the time of the transfer.

# Importance of a finding of tainted gift POCA s9 and s83

## **S9. Available amount**

The available amount is the aggregate of—

- (a) the total of the values of all the free property
- (b) the total of the values (at that time) of all tainted gifts.

...

## **83 Realisable property**

Realisable property is—

- (a) any free property held by the defendant;
- (b) any free property held by the recipient of a tainted gift.

# What is a Gift?

- Not defined in POCA or DTA/CJA– “gift caught by the Act”
- Halsbury’s Laws (4<sup>th</sup> Ed)
- Blake J in *Meisels v Lichtman* [2008] EWHC 661

- Modified by Jefford J in *Re Somaia* [2017] EWHC 2554 (QB):

"A gift made between living persons... may be defined shortly as the transfer of any property from one person to another gratuitously while the donor is alive and not in expectation of death. It is an act whereby something is voluntarily transferred from the true owner in possession to another person with the full intention that the thing shall not return to the donor. A gift appears to be effective when the donor intends to make it a gift and the recipient takes the thing given and keeps it knowing that he has done so. The mere fact that the recipient regards the thing given as a loan and intends so to treat it does not by itself prevent the transaction from being effective as a gift."



# The key features of a gift (Re Somaia)

- There must be a transfer of the legal and beneficial interest
- It need not be in good faith (R v Maidstone Crown Court, ex p. Dickens (unrep, 4 March 1991))
- It must be voluntary and gratuitous (ie no consideration)
- It could be a conditional gift – “look after this for me - you can keep it if I get convicted”
- The donor must intend that the gift will not be returned to him.
- The donee must accept the gift.

# “Gift” provisions in confiscation proceedings

- Not the same as s423 of IA 1986 – transaction at undervalue. Where Court makes an order to restore the gift to donor – see para. 19 of Richards [2008] EWCA Crim 1841
- Neither is it the position that the gift is treated per se as sham or null.
- Simple position is gift takes place but is nevertheless considered as part of D’s realisable property.
- Part of realisable property the purposes of quantifying the confiscation order AND for enforcement (against the donee if necessary)



## The reality of the situation

- What has actually been transferred?
- A transfer for apparently good consideration (but mala fides) may in fact be a gift.
- An apparently outright transfer for no consideration may not be a gift (eg because D has retained a secret beneficial interest)
- A gift may fail because the donee does not accept it
- A sham is not a gift – because nothing has actually been transferred.

# Why does it matter? – (1)

## Available Amount

- The effect of s.9:
- “the value” of all tainted gifts is part of his available amount.
- Even if the gift (or the donee) is no longer in fact available
- And (by s.81) the value of the tainted gift is the higher of:
  - (a) The value at the time of the gift of the property given + uplift for inflation
  - (a) The value of the “property found” at the time of the confiscation hearing)



# Why does it matter? – (2) Realisable Property

## The effect of s.83 POCA

- Where there is a tainted gift, ALL the property of the recipient is “realisable property”
- Can be subject of restraint order/enforcement receivership (even if the gift no longer exists)
- NB The “legislative steer” in s.69 applies:
- S.69(2)(c) the power ...must be exercised without taking account of any obligation of the defendant or a recipient of a tainted gift ;
- S.69(3)(b): in the case of realisable property held by a recipient of a tainted gift, the powers must be exercised to realise the value of gift;

# Example – genuine gift

- In 2013 D gives a case of wine (value £1000) to his friend Z.
- In 2014 Z drinks it.
- In 2015 D is charged and P gets a Restraint Order
- The Court finds that this was a tainted gift (gift made <6 years before charge date) and so the Restraint Order may include Z's property ("any free property held by the recipient of a tainted gift" – s.83(b))
- But s.69(3)(b) limits the power to restraining Z's assets to "the value for the time being" of the gift – ie (under s.81(1)(a)) to £1000 + inflation
- In 2016 D is convicted. In his confiscation proceedings the Court will hold that a value of £1000 (+ inflation) is to be included within his available amount (s.9)
- In 2017 D fails to pay his order, so a Receiver is appointed over Z's assets (again restricted by s.69(3)(b) to £1000 + inflation)



# Example – not a genuine gift

- In 2013 D gives Z a case of wine (value £1000) with instructions that it is to be returned to him to celebrate his release from prison in a few years time.
- D agrees, and does not drink it, but stores it in his cellar.
- This is not a gift.
- None of Z's assets can be restrained.
- The value of £1000 is included as part of D's "available amount"
- The case of wine is still "realisable property" (because it is D's property) and so the Receiver can be appointed to realise it
- NB if Z (or D) drank it, then it is not part of the available amount at all
- So D (and Z) are better off than in the case of the genuine gift.



# The implications for s.10A POCA

- S.10A applies only where:
  - D holds property which is likely to be realised or otherwise used to satisfy his confiscation order, AND
  - Another person (TP) holds, or may hold, an interest in the property
- A person “holds” an interest in property if he holds an interest in it (s.84(2)(a))
- Where there has been a genuine gift, D no longer holds the property, so s.10A has no application.
- But where there is no gift, or no complete gift, TP may claim an interest, and the Court may determine the extent of D’s interest in the property



## Caselaw on Tainted Gifts and s.10A

- R v Richards [2008] EWCA Crim 1841
- R v Smith (Kim) [2014] 1 WLR 898
- R v Johnson (Beverley) [2016] 4 WLR 57
- R v Hayes (CCC 14.3.16)
- Re Somaia [2017] EWHC 2554 (QB)
- R v Box [2018] EWCA Crim 542
- R v Hulland [2018] EWCA Crim 691
- *R v Ghulam [2018] EWCA Crim 1691 (about s.10A)*

## Underlying purpose of tainted gift provisions

- LJ Toulson in Richards [2008] EWCA Crim 1841 para 21
- “No self-respecting organised criminal would expect to be caught with high-value property in his own name readily identifiable, particularly since the enactment of legislation which is designed to strip such criminals of their profits. As a matter of standard practice he is likely to have taken steps to transfer high-value assets to nominee companies, offshore trusts or trusted associates who can be looked upon to harbour the assets until such time as he perceives that the danger has passed or he has served any sentence of imprisonment....



## R v Maidstone CC exp Dickens unreported 4 March 1991

- D transferred his share in the matrimonial home to his wife.
- D contended consideration was giving up of maintenance payments.
- Divisional Court –
  - This was a transaction as an undervalue.
  - The Act (DTA) covers transfer of property which is not bona fide.
  - Look at reality of situation

Jefford J in Somaia at para. 73 – Dickens is authority for proposition:

where apparently good consideration – Crt can look at the reality of transaction and decide mala fides means it is not good consideration.

# R v Richards [2008] EWCA Crim 1841

- Rogers transfers 5 properties to Richards.
- Proceedings brought against both.
- Rogers case – 5 properties part of his benefit and his available amount.
- Richard's case the property transferred from Rogers is found to be part of his available amount.
- Argued how can it be available to Richards as well.
- CA – Judge said Richards benefits by obtaining value of 5 properties
- But did not address at any point what Richards interest in these 5 properties was – beneficial owner or nominee.
- Pros argue gift – but by confiscation Rogers is beneficial owner.  
(Boomerang)

# Richards

- CA –They are not joint owners. – therefore can't belong to both
- The beneficial interest belonged to Rogers (ie never really given to Richards)
- Therefore did not belong to Richards at the time of the transfer.
- Para 19 – tainted gifts only apply if there has been a transfer of property.
- It is for property law to determine if there has been a transfer and what transferred
- If there is a gift section 77-78 do not prevent that having legal effect
- The position here - Richards to “look after the properties”.
- He never obtained them – always remained the property of Richards.
- The appellant did not receive the full beneficial interest of the houses.
- Did Richard receive rents, was that benefit (para.25)

## Re Somaia [2017] EWHC 2554 (QB)

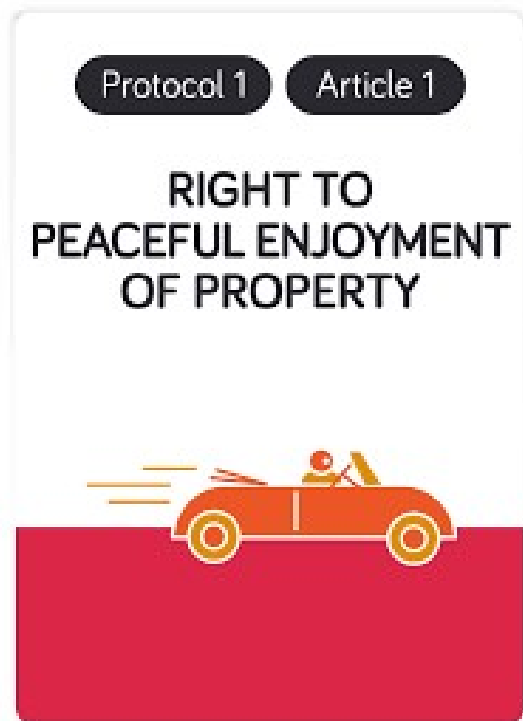
- Confiscation order made and not paid.
- Application for a Receiver CJA 88 – to cover gifts to ex-wife.
- 7 Transfers of monies to her approx. £575,000
- Mrs Justice Jefford – provisions of CJA not all encompassing code on “Gifts”
- Meaning of gift:
  - Effective and voluntary transfer of property.
  - Donor’s intention is gift will not be returned – although in confiscation proceedings he may hope and expect that it will be.
  - Gift must be accepted.
  - No consideration or undervalue.
- In this case there was no effective transfer.
  - Monies were paid into the account for the use of Mr Somaia on the facts

# R v Smith (Kim) [2014] 1 WLR 898

- Smith commits benefit fraud - £23,000. Repays approx. £11,000.
- Confiscation order made in sum of £8394.99
- Made up entirely of gifts to family.
- S argues this sum irrecoverable and therefore have no value.
- Rely upon Najafpour as authority for – “if it is impossible to recover a debt” – then inconsistent with structure of act to include because trigger default term is inevitable.
- CA – Judge did not find that gifts were irrecoverable.
- The valuation of gifts is dealt with in s.81. There is no mention of recoverability there.
- The whole point of including assets given away by the offender - to prevent the offender dissipating his assets by giving them away

# Proportionality and Gifts

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# Proportionality - R v Johnson (Beverley) [2016] 4 WLR 57

- Smith argument re-visited post Waya.
- A confiscation order £20,000 – in respect of Gift (not the proceeds of crime)
- Gift – virtually worthless at the date of the making of the confiscation order.
- CA, raise proportionality - the judge should carefully consider three matters:
  - **the robustness of the evidence of the value of the tainted gift.**
  - **the proportionality of making an order in the sum sought (not discretion) and**
  - **whether the term of imprisonment to be imposed in default should be reduced.**
- Court must consider all the circumstances when imposing default term.
- If enforcement impossible – **could substantially reduce** - term imposed in default.
- In this case she had been able to pay within seven days of being imprisoned

# Proportionality - R v Box [2018] EWCA Crim 542

- Need clear, complete and unassailable evidence that a tainted gift could not be recovered before = disproportionate.
- A limited restriction.
- “In some exceptional cases where it will simply lead to a sentence of imprisonment being served which the defendant in question can do nothing about”.
- It was directed at the cases where proportionality had been found by the Court (Waya [2013] 1 AC 294 and Harvey [2016] 2 WLR 37)



# Proportionality - R v Hulland [2018] EWCA Crim 691

- H stole cash and jewellery, including two watches in burglary .
- H is drug user –gave watches to his dealer.
- None of the stolen items was recovered.
- Recorder found transfer of the watches to the drug dealer is a "tainted gift"
- Value of the gift as £14,763.
- This was a proportionate order.
- Recorder was not satisfied that enforcement of the order was impossible.
- Did not know if others might pay on his behalf.
- Correct to conclude that matter was uncertain.
- Proportionality is the exception.

# Consideration?



# Consideration - R. v Usoro [2015] EWCA Crim 1958

- Concerned child maintenance payments made by the defendant.
- Def argues that this amounts to adequate consideration.
- Held not to be gifts.
- The payments had the effect of wholly or partly discharging the defendant's legal duty to his children.
- Amounted to consideration of value.
- Was value plainly financial and capable of assessment?

## Consideration - R v Hayes [2018] 2 Cr. App. R. (S.) 27

- Property purchased solely with D's funds - put into the joint names of D and W.
- Prosecution argue Gift.
- D argues familial service provided by the wife's = consideration for the purposes of section 78(1).
- POCA defines neither "gift" nor "consideration".
- It is clear that s.78(1), that the consideration must have value, which must be capable of being assessed in monetary terms.
- Donee's knowledge of the criminal source of gifts is irrelevant.
- The familial service provided by wife were incapable of monetary assessment.
- Accordingly assessment of adequacy is impossible.

## Hayes – Guidance – Para. 58

- Place a value upon the property transferred, at the time of transfer;
- Has consideration has been provided by the recipient of the property.
- Assess the value of the consideration provided;
- Does consideration match value of property transferred, at the time of transfer;
- If a significant difference apply the calculation prescribed in s. 78 (2) ; thereafter also applying the provisions of s. 81 as appropriate.
- Consider objectively and based on evidence
- Where consideration is not direct financial contribution - is capable of being assessed as consideration of value and (if it is) to what extent.
- Consideration must has nexus with the transfer of property in question.
- Any consideration which is asserted to have been provided must, for the purposes of s. 78 (1) , be capable of being ascribed a value in monetary terms
- Each case, ultimately, will depend on its own facts and circumstances.



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